No. 2510

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SWAYNE & HOYT, INC. (a corporation),
Plaintiff in Error,

vs.

GUSTAV BARSCH,
Defendant in Error.

PETITION OF PLAINTIFF IN ERROR FOR A REHEARING.

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Filed this ..... day of September, 1915.

FRANK D. MONCKTON, Clerk.

By ..... Deputy Clerk.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The plaintiff in error, Swayne & Hoyt, Inc., respectfully asks a rehearing in this case particularly that further consideration may be given to a single point, dealt with for the first time in the majority opinion.

The majority opinion concludes as follows:

> "The ground of jurisdiction in the court below was diversity of citizenship. The citizenship of the defendant is properly alleged in the complaint, but the plaintiff neglected to allege his own citizenship. Under the Act of Congress approved March 3, 1915, which permits an amendment in the appellate court in such a case so as to show on the record diverse citizenship and jurisdiction, the plaintiff will be

> permitted to file, within ten days, such an amendment, and inasmuch as the question of the defect in the pleadings has not been raised by the parties, this order is made without costs to the plaintiff.''

On or about the 16th of August, 1915, the defendant in error filed in this court an amended complaint, pursuant to the above quoted portion of the majority opinion, and subsequently on August 23, 1915, an order was made affirming the judgment.

The amended complaint was in all respects the same as the original complaint which appears in the record, with the exception that the following paragraph is inserted:

> ''That the plaintiff now is and was during all the times herein mentioned a resident and citizen of the State of Oregon.''

Thus, for the first time, at the very conclusion of the case, an allegation is made by plaintiff that he ''now is and was during all the times herein mentioned a resident and citizen of the State of Oregon''. Upon this bare allegation, which plaintiff in error has not yet had an opportunity even to deny—much less to disprove, and with respect to which defendant in error has not yet even been called upon to produce evidence, the judgment is affirmed. In other words, it is admitted that the residence and citizenship of the defendant in error in the State of Oregon are jurisdictional facts without which the judgment of the district court could not stand. These facts were of course issuable, and upon them plaintiff in error was entitled to its day in court. It is respectfully submitted that plaintiff in error

has not had its day in court upon these issues, and that if the judgment is allowed to stand upon the bare allegation of residence and citizenship contained in the amended complaint of defendant in error, it is thereby deprived of its property without due process of law in violation of the fifth amendment to the Constitution of the United States.

Such a result does not find justification in section 274c of the Judicial Code contained in the amendatory act of March 3, 1915. That section reads as follows:

> "Sec. 274c. That where, in any suit brought in or removed from any State court to any district of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though *defectively alleged,* either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly *pleaded* at the inception of the suit, or, if it be a removed case, in the petition for removal."

It is submitted that this section has no applicability whatsoever to the case at bar. The section allows an amendment to be made in the Circuit Court of Appeals in cases where

> "the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively *alleged* * * *."

It then provides that upon the amendment the suit shall be proceeded with

> "the same as though the diverse citizenship had been fully and correctly *pleaded* at the inception of the suit".

It is apparent that this section was intended to remove a defect *in the pleadings* and not a defect *in the record.* The language is, "though defectively *alleged*", and, "the same as though the diverse citizenship had been fully and correctly *pleaded*". In other words, the section aims to cover a case *where the diversity of citizenship appears in the record, but is defectively alleged.*

The evil which existed before this amendment was sufficient to justify the amendment. In cases where the record fully showed before the appellate court that "diversity of citizenship in fact existed", but where such diversity of citizenship was not properly alleged in the pleadings, it was necessary for purely technical reasons to send the case back for a retrial. The amendment is aimed at this cumbersome and useless procedure and fully cures the vice of it.

It is obvious that the amendment could not have the effect which the court has given it in this case. The court has construed the section to mean that wherever as a matter of fact diversity of citizenship exists (even though such diversity of citizenship did not appear from the bill of exceptions or any other portion of the record), the pleadings may be amended to show diversity of citizenship. In cases like the present, diversity of citizenship is a jurisdictional fact. It is unbelievable, therefore, that such fact may be established merely by

pleading it. Such fact must not only be pleaded, it must be proved. The construction which the court has given to the amendment admits the recovery of a judgment on the bare pleading of a jurisdictional fact.

We submit, first, that there is no possible construction for this amendment, except that it applies only to cases where it affirmatively appears in the record that diversity of citizenship existed. But, assuming that we are wrong in this contention, we believe that counsel for defendant in error will admit that there must be some showing in support of his allegation of diversity of citizenship. The court must at least order a reference to determine whether or not the defendant in error's allegation of his residence and citizenship in Oregon in fact exists. The amendment does not confer upon the court any jurisdiction to try this issue, nor do we know of any machinery which the court possesses to try it. However, unless some such proceeding is possible, we respectfully submit that the judgment must be reversed and the case remanded to the trial court with instructions that it try out this issue. In this connection it should be borne in mind that upon a writ of error from a judgment in an action at law, the jurisdiction of this court is limited exclusively to questions of law, and it has never been suggested that in such a case the Circuit Court of Appeals could deal in any way with a question of fact.

The situation in which the plaintiff in error is left by the judgment of affirmance in this case is a singular one. It has no knowledge whatsoever of the truth or untruth of the bare allegations in the amended com-

plaint as to Barsch's residence and citizenship in the State of Oregon. Unless said allegation is true, the District Court did not possess jurisdiction, and its judgment against plaintiff in error is void. Plaintiff in error was surely entitled to a day in court upon this issue, and was entitled not only to produce such evidence as it could to negative such allegation, but to cross-examine Barsch himself as to it. It is respectfully submitted that every right which plaintiff in error possessed in the premises is denied to it by reason of the construction which this court has seen fit to place upon the amendment referred to.

Dated, San Francisco,
September 4, 1915.

Respectfully submitted,

IRA A. CAMPBELL,
SNOW & MCCAMANT,
Attorneys for Plaintiff in Error and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

IRA A. CAMPBELL,
Of Counsel for Plaintiff in Error and Petitioner.